

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Adopt
Regulations for Automatic Vehicle
Monitoring Systems

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PR Docket No. 93-61

ORDER ON RECONSIDERATION
OF THE SECOND REPORT AND ORDER

Adopted: January 15, 1999

Released: January 21, 1999

By the Commission:

I. INTRODUCTION

1. In this *Order*, we deny the Petition of Hennepin County, Minnesota ("Hennepin" or the "County") for Partial Reconsideration of the Commission's *Second Report and Order* in the above-captioned proceeding. In the *Second Report and Order*, the Commission adopted rules governing competitive bidding for multilateration Location and Monitoring Service (LMS) frequencies.¹ Specifically, the Commission determined that Section 309(j) of the Communications Act, as amended by the Balanced Budget Act of 1997, requires the Commission to assign licenses from among mutually exclusive applications for multilateration LMS by competitive bidding or auction.² Hennepin requests that the Commission amend its LMS rules to grant exemption from the bidding process, pursuant to Section 309(j)(2) of the Act, to applicants intending to use LMS frequencies for public safety purposes, thus permitting the County to obtain a LMS license without participating in competitive bidding.³ The Association of Public-Safety Communications Officials-

¹ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, PR Docket No. 93-61, FCC 98-157 (1998) ("*LMS Second Report and Order*").

LMS Second Report and Order at ¶ 9.

³ We note that Hennepin has also filed an application to acquire unassigned frequencies for public safety use pursuant to Section 337(c) of the Communications Act. Application for License Pursuant to § 337 of the Communications Act of 1934 filed by Hennepin on January 11, 1999; 47 U.S.C. § 337(c). See also Hennepin Reply at 4-7. We do not address here the merits of Hennepin's assertion that it meets the Section 337(c) requirements for obtaining spectrum without engaging in competitive bidding. See *License Communications*

International, Inc. ("APCO") filed comments supporting Hennepin's Petition. Comtrak and Teletrac License, Inc. ("Teletrac") filed oppositions to the Petition to which Hennepin replied.

II. BACKGROUND

2. LMS is a service that uses advanced radio technologies operating in the 902-928 MHz frequency band to support transportation functions.⁴ Multilateration LMS technology is used to locate vehicles or other objects throughout a wide geographic area.⁵ For example, multilateration LMS systems are used by municipalities to pinpoint the location of their buses or police cars, by trucking companies to track individual vehicles, and by private entrepreneurs to recover stolen vehicles.

3. In the *LMS Report and Order*, released in 1995, the Commission determined that use of competitive bidding for distribution of LMS licenses met the general statutory criteria set forth in Section 309(j) of the Act and that LMS licenses were therefore auctionable.⁶ At that time, Section 309(j) of the Act gave the Commission authority to use competitive bidding to grant mutually exclusive licenses only if the "principal use" of the spectrum was to offer subscriber-based services and competitive bidding would promote certain policy objectives.⁷ Subsequently, Congress enacted the Balanced Budget Act of 1997

Services, Inc., South Bay Regional Public Communications Authority, Paging Systems, Inc., Memorandum Opinion and Order, FCC 98-162 (rel. July 30, 1998).

⁴ *LMS Second Report and Order* at ¶ 3, ¶ 5. The definition of LMS also includes existing Automatic Vehicle Monitoring operations below 512 MHz. *Id.* at ¶ 5 n.7.

⁵ The Commission has defined two types of LMS systems-- multilateration and non-multilateration. *LMS Second Report and Order* at ¶ 4. In this *Order*, we address only the licensing of multilateration systems. Multilateration LMS systems track vehicles or other objects by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit to be located. *LMS Second Report and Order* at ¶ 4.

⁶ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Report and Order*, PR Docket No. 93-61, 10 FCC Rcd 4695, 4725-27, ¶¶ 54-57 (1995) ("*LMS Report and Order*").

⁷ 47 U.S.C. § 309(j). Specifically, at the time of the *LMS Report and Order*, 47 U.S.C. § 309(j) read as follows:

(j) Use of Competitive Bidding.-

(1) General Authority.- If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(the "Budget Act"), which amended Section 309(j) by expanding the Commission's auction authority.⁸ The Commission is now required to assign licenses by competitive bidding whenever applications for spectrum use are mutually exclusive unless an express exemption applies.⁹ Section 309(j)(2) of the Act specifies only three types of licenses that are exempt from the auction process: (1) licenses for public safety radio services; (2) initial licenses for digital television service, and (3) licenses for non-commercial educational broadcast stations and public broadcast stations.¹⁰

4. In the *LMS Second Report and Order*, the Commission determined that its expanded auction authority under Section 309(j) of the Act, as amended by the Budget Act,

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- (2) Uses To Which Bidding May Apply.- A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that-
- (A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee-
 - (i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or
 - (ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; and
 - (B) a system of competitive bidding will promote the objectives described in paragraph (3).

⁸ Balanced Budget Act of 1997, P.L. 105-33, § 3002, 111 Stat. 251 (1997) ("Budget Act") (amending 47 U.S.C. § 309(j)).

⁹ 47 U.S.C. § 309(j)(1). Section 309(j), as amended by the Budget Act, provides:

(j) Use of Competitive Bidding.-

(1) General Authority.- If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions.- The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission-

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that-

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in Section 397(6) of this Act.

¹⁰ 47 U.S.C. § 309(j)(2).

requires it to assign licenses for multilateration LMS by competitive bidding.¹¹ The Commission further concluded that the LMS auction, to be held on February 23, 1999, would follow the general competitive bidding procedures of Subpart Q of Part 1 of the Commission's rules, as amended by the Part 1 proceedings, unless specifically indicated otherwise.¹²

III. DISCUSSION

5. In its petition, Hennepin requests that the Commission amend its rules to grant exemption from the competitive bidding process, pursuant to Section 309(j)(2) of the Act, to applicants intending to use LMS frequencies for public safety purposes.¹³ Hennepin states that it seeks a LMS license to enhance the effectiveness of its public safety services to protect the life, health, and property of approximately 1.1 million people in the State of Minnesota.¹⁴ Hennepin asserts that it intends to use LMS technology to improve its capabilities in two areas: (1) emergency vehicle location and (2) community corrections.¹⁵ Hennepin contends that, if granted a LMS license, it would use LMS technology to locate and dispatch emergency vehicles such as ambulances, fire trucks, police cars, and snowplows.¹⁶ Hennepin also claims that it would use LMS to help enforce court-ordered location restrictions on criminal offenders.¹⁷ Hennepin maintains that if it is not granted an exemption from the

¹¹ Specifically, the Commission stated that:

... the Budget Act provides that all licenses and construction permits for which mutually exclusive applications are accepted, with certain exemptions not relevant here, shall be granted by means of competitive bidding. We therefore believe that we lack discretion to resolve mutually exclusive LMS license applications by any means other than competitive bidding. Accordingly, we find that the Budget Act's amendments to Section 309(j) of the Act direct us to assign licenses for multilateration LMS by competitive bidding. *LMS Second Report and Order* at ¶ 9.

¹² *LMS Second Report and Order* at ¶¶ 11-12.

¹³ Petition at iii.

¹⁴ *Id.* at 1-2. Hennepin states that there are 45 cities and one township in Hennepin County and that the County is the most populous of Minnesota's 87 counties. *Id.* at 2.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

competitive bidding process and is, instead, forced to compete for LMS spectrum at auction, it will be unable to obtain a license and ensure adequate and reliable public safety services.¹⁸

6. We decline to amend our rules to grant potential licensees, such as Hennepin, an exemption from the LMS auction simply because such applicants seek to use LMS frequencies for public safety services. Section 309(j)(2)(A) exempts from auction licenses for a specific category of service -- "public safety radio services."¹⁹ Importantly, "public safety radio services" does not refer to an individual applicant's proposed use of the spectrum but includes frequencies allocated by the Commission to public safety uses. This method of allocating spectrum specifically for use by eligible public safety entities seeks to ensure that the needs of all public safety entities are met rather than the needs of only those with the resources to seek special relief from the Commission. As Teletrac and Comtrak point out, LMS is not an auction-exempt "public safety radio service."²⁰ Rather, the Commission determined, in 1995, that LMS spectrum was auctionable.²¹ The public safety radio services exemption does not entitle individual users to remove licenses from auctions licensing simply by claiming a public safety use. The fact that LMS frequencies may be used for public safety purposes does not make LMS a "public safety radio service."²² Spectrum, such as LMS, that is allocated for commercial use and has already been determined to be auctionable may not be acquired outside of the competitive bidding process merely because an entity later asserts it also has public safety uses.

7. Hennepin argues that Congress did not intend the public safety exemption from competitive bidding to apply only to specifically allocated public safety spectrum.²³ In support of this contention, Hennepin refers to a statement in the Conference Report to the Budget Act that "the public safety radio services exemption described herein is much broader than the explicit definition for 'public safety services' contained in section 3004 of this title."²⁴ Hennepin contends that to be consistent with legislative intent as expressed in the Conference Report, the exemption must extend beyond specific spectrum allocations for

¹⁸ *Id.* at 13.

¹⁹ 47 U.S.C. § 309(j)(2)(A).

²⁰ Teletrac Opposition at 4; Comtrak Opposition at 5 (citing the *LMS Report and Order* at ¶ 56).

²¹ *LMS Report and Order* at 4725-27, ¶¶ 55-57.

²² See Teletrac Opposition at 4.

²³ Petition at 9.

²⁴ *Id.* (quoting from H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997)).

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²¹ *LMS Report and Order* at 4725-27, ¶¶ 55-57.

²² See Teletrac Opposition at 4.

²³ Petition at 9.

²⁴ *Id.* (quoting from H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997)).

public safety and encompass any license for spectrum that meets the criteria of Section 309(j)(2) of the Act.²⁵

8. We acknowledge that the public safety radio services exemption is broader than the definition for "public safety services." Contrary to Hennepin's claims, however, it does not follow that Congress intended the exemption to apply to any spectrum license that any individual applicant chooses to use for public safety purposes. We agree with Teletrac that in amending Section 309(j), Congress did not establish a system of case-by-case determinations of eligibility for auction exemptions.²⁶ Section 309(j) represents a policy determination that, in general, license assignment is best accomplished through a system of competitive bidding. In the Budget Act, Congress defined the "public safety radio services" exemption of Section 309(j)(2) to be broader than the definition for "public safety services" to permit entities, in addition to those defined as providing "public safety services," to be providers of auction-exempt services.²⁷ There is no evidence that Congress intended to permit individual license applicants claiming a public safety use to nullify previous Commission determinations that services, such as LMS, are auctionable.

9. In the *LMS Report and Order*, the Commission specifically determined to assign licenses for multilateration LMS frequencies through competitive bidding and did not choose to allocate any portion of the 902-928 MHz band to public safety services.²⁸ In fact, no public safety services provider raised the issue of designating this portion of the spectrum for public safety use in the allocation proceeding. Hennepin, itself, did not even raise the public safety issue nor did it participate throughout the Commission's LMS rule making proceeding until the filing of its petition for reconsideration, shortly before auction. We therefore decline to set aside LMS spectrum specifically for public safety purposes at this time.²⁹

²⁵ Petition at 9.

²⁶ Teletrac Opposition at 3.

²⁷ See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997) (stating that the public safety radio services exemption includes, for example, private internal radio services used by utilities and railroads as well as radio services used by not-for-profit organizations that offer emergency road services, such as the American Automobile Association (AAA)).

²⁸ *LMS Report and Order* at 4725-27, ¶¶ 54-57.

²⁹ Both Hennepin and APCO argue that the Commission should set aside some portion of the LMS spectrum for assignment to public safety agencies, outside of the auction process. Petition at 15; APCO Comments at 2-3.

10. Hennepin argues that the Commission should evaluate spectrum use on a case-by-case basis and allow non-commercial applicants, proposing a public safety use of LMS spectrum, to obtain licenses without engaging in competitive bidding.³⁰ Hennepin's interpretation of Section 309(j) of the Act would permit any entity seeking to provide public safety services to prevail against all other mutually exclusive applicants in securing spectrum designated for auction. As Comtrak points out, such an interpretation would, in effect, give public safety service providers a "right of refusal" over any spectrum made available by the Commission.³¹ Under this scenario, the Commission would have authority to auction only those licenses not desired by public safety entities.³² Consequently, spectrum would be freely available to certain entities on demand, and the Commission, as well as other applicants, would not know in advance which licenses are available for auction, thereby creating indeterminable delays in deployment of the spectrum, contrary to the mandate of the Communications Act.³³ Moreover, permitting public safety entities to override the designation of spectrum as auctionable would undermine the Commission's expanded auction authority under the Budget Act.

11. Hennepin argues that the application of the public safety radio services exemption to the LMS auction is analogous to the Commission's consideration of the exemption for public broadcast stations in Section 309(j)(2)(C) of the Act. In the *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* proceeding, the Commission has under consideration the exemption from competitive bidding for noncommercial and public broadcast stations that apply for stations on channels not reserved for public broadcasting.³⁴ We note that we have not yet made a determination

³⁰ Petition at 8 and iii.

³¹ Comtrak Opposition at 3.

³² See Comtrak Opposition at 2.

³³ We agree with Comtrak's argument that Hennepin's interpretation of the public safety exemption would permit all entities identified in the legislative history of the Budget Act as using "public safety radio services," such as railroads, utilities, and the American Automobile Association, to obtain licenses for spectrum outside of the auction process thereby creating a slippery slope in terms of the number of LMS license applicants that would qualify for exemption. Comtrak Opposition at 3; see H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997).

³⁴ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Further Notice of Proposed Rule Making*, MM Docket No. 95-31, FCC 98-269 (rel. October 21, 1998); see also *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, MM Docket No. 97-234, 13 FCC Rcd 15920 (1998).

concerning the applicability of that exemption.³⁵ On its face, the Section 309(j)(2)(C) exemption differs in kind from the exemption at issue in this proceeding. The Section 309(j)(2)(C) exemption refers to "stations," while the Section 309(j)(2)(A) exemption applies to "public safety radio services."³⁶ We will make a separate determination concerning the scope of the public safety radio services exemption in an upcoming proceeding.

12. Hennepin asserts that granting the County an exemption to obtain a LMS license would be consistent with the Commission's stated policy objective of providing public safety service providers with greater access to new technologies.³⁷ Hennepin contends that because only the 902-928 MHz band is allocated for LMS services, public safety service providers interested in using LMS services must compete in the LMS auction or risk losing access to LMS technology.³⁸

13. The Commission recognizes the important contributions made by public safety service providers to the health and safety of the citizens in their communities. Further, the Commission is committed to helping public safety providers meet their needs and believes that it may be possible for Hennepin to achieve its public safety goals in a manner consistent with our rules. We note that frequencies in the 150-170 MHz and 450-470 MHz bands have been reserved for public safety service providers and may be assigned for LMS.³⁹ In addition, Hennepin may participate in the Commission's ongoing proceeding to allocate the 5.850-5.925 GHz band to Dedicated Short Range Communications ("DSRC") of Intelligent Transportation Systems ("ITS")⁴⁰ as well as in the rule making relating to the use and licensing of

³⁵ Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, MM Docket No. 97-234, 13 FCC Rcd at 15930-31, ¶¶ 24-25.

³⁶ See Comtrak Opposition at 5-6; Teletrac Opposition at 5.

³⁷ Petition at 12.


³⁸ *Id.*

³⁹ 47 C.F.R. §§ 90.20 and 90.355.

⁴⁰ Amendment of Parts 2 and 90 of the Commission's Rules to Allocate the 5.850-5.925 GHz Band to the Mobile Service for Dedicated Short Range Communications of Intelligent Transportation Services, *Notice of Proposed Rulemaking*, ET Docket No. 98-95, FCC 98-119 (rel. June 11, 1998). Commenters to this proceeding have asserted that the 5.850-5.925 GHz frequency band has potential public safety applications. The comment cycle in this proceeding closed on October 13, 1998, however, the Commission will accept late-filed comments.

frequencies in the 746-806 MHz public safety band.⁴¹ Alternatively, Hennepin may purchase Global Positioning Satellite equipment to help track its vehicles or rely on commercial LMS service providers. Hennepin argues that commercial LMS service is not cost effective because providers will pass along their cost of obtaining spectrum through the competitive bidding process to their customers, i.e., the County.⁴² Hennepin also questions the reliability of commercial LMS service providers. Hennepin, however, has not submitted any data showing that commercially available service is more costly or less reliable than that offered directly by public entities.⁴³

14. Accordingly, we reject Hennepin's petition for reconsideration as contrary to the public interest. IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petition for reconsideration filed in response to the *Second Report and Order* IS DENIED, as provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁴¹ The Commission recently reallocated to public safety services 24 MHz of spectrum between 746 and 806 MHz. The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010 and Establishment of Rules and Requirements For Priority Access Service, *First Report and Order and Third Notice of Proposed Rulemaking*, WT Docket No. 96-86, FCC 98-191 (rel. September 29, 1998); 47 U.S.C. § 337.

⁴² Petition at 13.

⁴³ See Teletrac Opposition at n.8; Comtrak Opposition at 7-8.